IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 23, 2009

STATE OF TENNESSEE v. RALPH BYRD COOPER, JR.

Appeal from the Criminal Court for Anderson County
No. A3CR0059 Donald R. Elledge, Judge

No. E2008-02044-CCA-R3-CD - Filed August 3, 2009

The defendant, Ralph Byrd Cooper, Jr., was convicted by an Anderson County Criminal Court jury of aggravated rape. The trial court determined that the defendant was a repeat violent offender pursuant to Tennessee Code Annotated section 40-35-120 and ordered the defendant to serve a sentence of imprisonment for life without the possibility of parole. *See* T.C.A. § 40-35-120(g) (2003). The defendant appeals, arguing that the convicting evidence was legally insufficient and that the State did not meet its burden in proving that he was a repeat violent offender under the statute. Further, we review under our authority to determine plain error pursuant to Tennessee Rule of Appellate Procedure 36(b) whether the trial court erred in sentencing the defendant as a repeat violent offender when the State filed its notice of such enhancement after the jury's verdict. After a review of these issues, we affirm the trial court's judgment.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Mart S. Cizek, Clinton, Tennessee (on appeal and at motion for new trial hearing); and Kevin Angel, Clinton, Tennessee (at trial and sentencing hearing) for the appellant, Ralph Byrd Cooper, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; James N. Ramsey, District Attorney General; and Janice Hicks, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Introduction

This case arises from the January 29 and/or 30, 2003 aggravated rape of the victim. An Anderson County grand jury indicted the defendant for aggravated rape, *see* T.C.A. § 39-13-502 (2003), and aggravated assault, *see id.* § 39-13-102, on April 1, 2003. The State dismissed the aggravated assault charge on June 2, 2006, and trial commenced on June 8, 2006.

Trial

The victim testified that she first met the defendant while "cruis[ing] around" the Walmart parking lot in Oak Ridge in December 2002. She was nineteen years old at the time. She stated that she and her friends socialized with the defendant and his friends that night and that she saw the defendant and exchanged telephone numbers with him at a later date. On another occasion she went out with the defendant and briefly visited his home. She testified that her conversations with the defendant were never sexual in nature. She stated that the defendant had been "nice" to her, and she called him on the evening of January 29, 2003, to "hang out."

The victim drove herself and her friend, Shelly Johnson, to the defendant's mother's house in Oak Ridge. She testified that they entered the home and proceeded downstairs, where the defendant lived in a small apartment. After looking at "pictures on the computer of [the defendant's] four-wheel drive truck," the three left the home in the defendant's vehicle to buy some beer and Jack Daniels whiskey.

She testified that the defendant parked somewhere and that the group drank the beer and whiskey. She recalled that, at some point, the defendant left and returned with more whiskey. Later, the three went to a party at the home of one of the defendant's friends. The victim testified that she only remembered "the first part" of being at the house and that, due to her intoxication, she could not remember leaving.

The victim said, "I just remember being at [the defendant's] house and I woke up" in the defendant's basement apartment. She said the defendant "was on top of [her] and [they] were already both naked." The victim could not recall how she got undressed, and she did not know where her clothes were at the time. She stated the defendant had his hand around her throat. She testified that she was "shocked" and that she threatened to scream but the defendant stated that, if she did, he would kill her. She said, "I was too scared to scream or anything and I called up to God and [the defendant] said: Don't bring God into this but he cussed me."

The victim testified that the defendant "tried to have sex with [her]" but could not because "it wasn't wet." She said that they fought and that she told him that she "didn't want to do it and 'stop.'" She testified that she suffered pain in her neck from the defendant's strangling her and in her vaginal area from the defendant's "forcing it."

The victim stated that the defendant then stopped and told her that he was going to get some lubrication. He momentarily left the room, but the victim did not attempt to escape because she "wasn't that familiar with the house" and "didn't know how long he was going to be." When he returned, the defendant used the lubricant to facilitate his penetration of the victim's vagina.

The victim stated that she "just cooperated" with the defendant at that point because "[t]here wasn't nothing [she] could do." The victim stated that the defendant did not ejaculate. When the defendant finished, however, he "laid down like he was going to sleep . . . like nothing

ever happened." The victim testified that she then waited for him to fall asleep but that she "passed out" while waiting.

The victim testified that she awoke sometime later and noticed her clothes, except for her brassiere, on the floor. While the defendant remained asleep, she dressed and then found the basement apartment's bathroom. She used the restroom and then "looked in the mirror and [she saw] all them scratches and marks on [her] throat and stuff." She went back to the bedroom to obtain her jacket, which held her car keys. She testified that, at that point, the defendant awoke and sat up in the bed.

She stated that the defendant "asked for a hug" and "acted like nothing had ever happened, like no big deal." She told the defendant that she was leaving to find a job because she was unemployed at the time. She then hugged the defendant although she did not want to. She testified that she left the basement apartment and went upstairs, where she saw the defendant's mother and another woman she did not know. She stated that she did not speak with them, except perhaps a short "bye," and that she left and drove to her best friend's house.

Her friend attempted to convince the victim to report the incident to the police; however, the victim testified that she felt "guilty" and that the situation was "her fault" because she was "nineteen [years old] and drinking." She then went to her house and took a shower. She testified that she went to her boyfriend's workplace and informed him of the situation and that he took her to the Oak Ridge Police Department. The victim testified that she spoke with Detective Ron Boucher, who then sent her to the emergency room. She called her mother, who met her at the hospital.

Detective Boucher testified that he spoke with the victim at the Oak Ridge Police Department at approximately 12:30 p.m. on January 30, 2003. He said that he spent the "better part of the day" with the victim and that he instructed her to go to Methodist Medical Center. He took photographs, which were displayed to the jury, depicting injuries to the victim's face and neck. He described the wounds as "fresh."

Detective Boucher swore out a warrant against the defendant based on his interview with the victim. He was present when an Oak Ridge Police Department officer pulled the defendant's truck over on January 31, 2003. Detective Boucher stated that a brassiere, identified as belonging to the victim, hung from the visor on the driver's side of the truck. A man named Charles Oscar Smith, the defendant's cousin, was also in the vehicle.

At 8:45 p.m. on January 31, Detective Boucher spoke with the defendant at the Oak Ridge Police Department. After being advised of his *Miranda* rights, the defendant waived his rights and gave a statement. Detective Boucher testified that the defendant wrote and signed a statement, which was provided to the jury. The defendant told Detective Boucher that he first met the victim at the Walmart parking lot. He told Detective Boucher that on January 29, the victim called him to ask if she and her friend, Shelly Johnson, could "go riding around" with him. The defendant stated that he told them to come over and that Mr. Smith joined them that evening. He told Detective Boucher that they went by a golf course to drink and that he, Mr. Smith, and Ms. Johnson smoked

marijuana. The defendant told him that, after drinking at the golf course, they went to a party at a friend's house. According to the written statement, Ms. Johnson passed out at the party, so he drove her home and returned to the party.

The defendant told Detective Boucher that he, the victim, and Mr. Smith eventually returned to his mother's home to talk and drink. He said that he asked the victim if she wanted to go to bed and that she responded, "[Y]es." The defendant stated that they went into the bedroom and kissed and removed each other's clothing. He told Detective Boucher that the two began having sexual intercourse on his bed and that the victim said, "I don't think your [sic] going to get there so stop." He said that he kept going, which caused the two to "scuffle."

The defendant reported to Detective Boucher that the victim told him that she was hurting "down there" because she was "dry" and that he asked her if she wanted him to get lotion. He stated that the victim indicated she wanted lotion, and that, after applying the lotion, they continued to have sexual intercourse. He told Detective Boucher that after approximately 30 minutes she again said, "I really don't think your [sic] going to get there so let's stop." He did not stop, however, which caused another scuffle, resulting in their falling to the floor. The defendant then reported to Detective Boucher that they continued to have sexual intercourse in the bed again and that the victim again said, "[Y]ou are never going to get there can we stop[?]," and that this time he complied. He told Detective Boucher that the two fell asleep and that, the next morning, the victim woke him and told him that she was going to the bathroom and getting dressed so she could search for a job. He said that she hugged him and they talked for five or 10 minutes before she left.

Detective Boucher stated that the defendant reported that on four occasions the victim requested the intercourse to stop. Detective Boucher testified that he asked the defendant why he choked the victim and that the defendant neither admitted nor denied choking her. According to Detective Boucher, the defendant said that "he didn't remember choking her and . . . for [Detective Boucher] to tell her that he's sorry."

Doctor John Mesmer treated the victim on January 30, 2003. He said that the victim had "obvious abrasions or scratches to her face and her neck." He testified that the victim was accompanied by her mother and was "fairly calm."

On cross-examination, Doctor Mesmer stated that the victim told him that she and the defendant had originally planned to stay in separate bedrooms. She told him that the defendant attempted to force her to perform oral sex on him and that the defendant forcibly removed her clothing. She also said that she only drank five beers. Doctor Mesmer admitted that he found no evidence of penetration upon examining the victim's vagina; however, he noted that, taking into account the victim's age and the lapse of time since the sexual contact, he would not necessarily be able to observe such evidence.

The State rested, and the defense first re-called the victim to confront her about statements made to Doctor Mesmer that were inconsistent with her trial testimony. The victim admitted that she lied to Doctor Mesmer, and she said, "I still felt like I was in trouble for drinking and doing stupid things that I shouldn't have done." She testified that, after leaving the emergency

room, she returned to the Oak Ridge Police Department and told Detective Boucher "the whole truth."

The defendant testified that, when he first met the victim in the Walmart parking lot, he "hollered" something sexual in nature toward her, to which she "looked up and smiled" and "motioned" for him to approach her. He testified that he and the victim engaged in conversation, which included sexual innuendos and exchanged telephone numbers. The defendant stated that he and the victim went "four-wheeling" a couple of weeks later. He said that on that occasion, they consumed alcohol and that, at the end of the day, the victim wanted to stay at his house. The defendant testified that he took the victim to her home, however. He stated that he "basically just forgot all about [the victim]." He then saw the victim at a convenience store, and she "flagged [him] down" and asked whether he would call her again.

The defendant testified that, on January 29, 2003, the victim called saying that she and Ms. Johnson "wanted to go out and party." He said that the victim and Ms. Johnson arrived at his house and that, after a short time, the victim asked if they could obtain alcohol. He testified that the group obtained beer and liquor then went "mudding" by a golf course. He stated that Mr. Smith was also with the group and that they then went to a friend's house party. The defendant said that the victim was "very coherent" and that she continually asked him for the time because she was concerned with driving Ms. Johnson home before her boyfriend returned from work. He said that he drove Ms. Johnson home and returned to the party.

The defendant testified that he, the victim, and Mr. Smith returned to his home and continued drinking in his basement's living room. He maintained that, during this time, the victim was flirting with him and kissing him. He said that he asked the victim if she wanted to go to bed, to which she responded that she did.

He stated that the two went to his bedroom and kissed on the bed while removing each other's clothing. He testified that the two had sexual intercourse but that she "was dry and she said that she was kind of hurting." He said that he asked the victim if she needed lotion, to which she responded she did. He stated that he obtained lotion from his bathroom and restarted intercourse and that the victim did not object to continuing the sexual intercourse. He testified that the victim then said, "[A]re you ever going to get off?" He said that the two "scuffled" but that "the scuffling [they] did was more of just kind of rough sex . . . . She was getting into it and so was [the defendant]." He testified that, at one point when asked if he was ever going to "get off," he asked her if she wanted to quit. He said that when the victim said she wanted to stop having sex, he complied. He maintained that the two then "just held each other and went to sleep."

The defendant testified that when he awoke, the victim was dressed and stated that she was leaving to find a job. He said that the victim hugged and kissed him and that he told her that he would call her. The defendant stated that he did not notice any abrasions on the victim when she left his house.

The defendant maintained that the victim never cried out for help during intercourse and that she never told him to get off of her. He stated that he never threatened to kill her and did

not cause the injuries on her neck and face. The defendant maintained that he never held the victim against her will to prevent her from leaving.

Charles Oscar Smith testified that on January 29, 2003, he "met up with [the victim] and . . . went to a friend['s] house" and that everybody "got drunk." He testified that, after taking Ms. Johnson home, he went with the defendant and the victim to the defendant's basement apartment. He explained that the victim was conscious and was intoxicated "just like a normal person is when they drink." He said that he sat on the futon in the living room and that the defendant and the victim told him that they were going to bed. He testified that the defendant did not force the victim to go into the bedroom. Mr. Smith stated that he remained on the futon watching television for about an hour or an hour and a half after the two went to the bedroom. He said, "I heard them moaning and groaning and basically having fun." He testified that he saw the defendant go to the bathroom for "like a minute" and return to the bedroom. Mr. Smith testified that he was sleeping on the futon when the victim left in the morning.

On cross-examination, Mr. Smith admitted he was intoxicated and had smoked marijuana on the night of January 29; however, he said that he was "maintaining" and was not "wasted." He stated that he fell asleep while the television remained on.

Jan Elliot Bomar, the defendant's aunt, testified that she went to the defendant's mother's house at approximately 8:00 a.m. on January 30, 2003. She said that, upon arriving, she went downstairs to the defendant's basement apartment to obtain a small heater. She stated that she saw a woman lying in the defendant's bed under the sheets. She said that approximately 30 minutes later the victim came upstairs. Ms. Bomar testified that the victim said "good morning" and then left. She testified that the victim had no marks on her face and that she "seemed friendly."

Based on the evidence as summarized above, the jury convicted the defendant of aggravated rape on June 9, 2006.

Sentencing

Prior to trial, the State filed a "Notice of Intention to Use Prior Bad Acts for Impeachment and Enhancement of Sentence," listing the defendant's previous convictions. This "notice" included previous convictions of burglary and grand larceny in Roane County in 1988; convictions of theft of rental property and aggravated robbery in Blount County in 1995; two separate convictions of public intoxication in 1985 and 1987 and three convictions of passing worthless checks in 1997 in Knox County; and one conviction of theft in Klamath Falls, Oregon, in 1993. Further, the notice included an Oregon conviction on September 12, 1995, of three counts of "Sodomy (felony)." The notice only vaguely stated that the convictions would be used to enhance the defendant's sentence and did not specifically address the offender status sought.

On June 21, 2006, twelve days after the jury convicted the defendant, the State filed a "Sentencing Position" in which she stated that the defendant's "three convictions in 1995 for sodomy place [the] defendant in the category of 'repeat violent offender' under [Tennessee Code

Annotated section] 40-35-120 since the crimes of sodomy . . . are Class A felonies and have the identical elements of the Tennessee crime called 'Rape of a Child.'"

Code section 40-35-120 provides that defendants who have been convicted of certain violent crimes and have a criminal history of convictions of other qualifying violent crimes may be classified as a "repeat violent offender." *See* T.C.A. § 40-35-120. As relevant to this case, a defendant convicted of aggravated rape who has a prior conviction of rape of a child qualifies under the statute as a repeat violent offender. *Id.* § 40-35-120(a)(3)-(4), -120(c)(1)(E)-(F). The trial court found, and the defendant does not contest on appeal, that the defendant's sodomy convictions in Oregon contain the same elements as our state's definition of "rape of a child."

During the sentencing hearing, defense counsel argued that, with regard to the defendant's status as a repeat violent offender, the State failed to prove beyond a reasonable doubt that the defendant had served "separate periods of incarceration" as required by statute. *See id.* § 40-35-120(e)(1)-(2) (requiring a "[s]eparate period of incarceration" to qualify as a "[p]rior conviction" for purposes of repeat violent offender status), -120(g) (requiring the trial court to find "beyond a reasonable doubt that the defendant is a repeat violent offender"). Counsel argued,

> The issue the [S]tate has failed to prove . . . is that there were separate periods of incarceration. The [S]tate would point to the 111 months [sentence reflected in the sodomy judgments]. Your Honor, the offense date on the current charge is January 29, 2003. The date that they started giving [the defendant] credit from if the [c]ourt would look at the records that the state admitted, it's 12-29-1994. That is exactly 97 months from the date that [the defendant] was originally given time.

Defense counsel argued that the State simply "assume[d] [the defendant] went in and got out for good time." Counsel maintained that, because the current offense occurred 97 months after the commencement of his Oregon sentence, "it is impossible that [the defendant] served 111 months and that's the only proof the [c]ourt has." Counsel cited the State's failure to prove when the defendant was admitted and released from incarceration in Oregon.

The trial court dismissed the defendant's argument as "hyper-technical." It relied upon the certified judgment from Oregon, explaining, "[T]he fact is, when this [j]udgment was entered [the defendant] was sentenced to custody of the Corrections Division of the State of Oregon." The court noted that the defendant testified to sexual contact with the victim in Anderson County, Tennessee, and that this indicated that he obviously had been released from Oregon's custody.

The trial court also addressed the State's late-filing of notice of the defendant's status as a repeat violent offender. *See* T.C.A. § 40-35-120(i)(2) (requiring notice within 45 days of the defendant's arraignment, or, if the State fails to give such notice, providing for a continuance to allow 45 days between receipt of notice and trial). Trial counsel argued that the defendant should have been provided a continuance before the sentencing hearing; however, the court determined that

the defendant suffered no prejudice from denial of a continuance of the sentencing hearing and further determined that the late-filed notice did not adversely affect the defendant. The court entered a judgment of conviction on August 8, 2006, sentencing the defendant to a term of life imprisonment without possibility of parole.

Motion for New Trial

On September 1, 2006, the defendant filed a pro se motion for new trial that argued that his trial counsel was ineffective. An amended motion for new trial was filed by the defendant's appellate counsel on January 24, 2008, alleging additional grounds for ineffective assistance of trial counsel, insufficiency of the convicting evidence, and that the State "failed to timely file issues regarding [s]entence [e]nhancement in a timely manner and the [c]ourt erred in considering those factors."

At the July 25, 2008 motion hearing, the defendant abandoned his ineffective assistance of counsel claims and primarily argued that the State's notice of his status as a repeat violent offender violated the 45-day notice requirement of Code section 40-35-120. *See* T.C.A. § 40-35-120(i)(2). Counsel argued that the State's initial "Notice of Intention to Use Prior Bad Acts for Impeachment and Enhancement of Sentence" did not comply with the statute, which requires a statement that identifies the defendant as a repeat violent offender and lists the dates of prior periods of incarceration and the nature of the offenses. Counsel noted that the May 12, 2003 filing failed to state that the defendant was a repeat violent offender and that it "merely list[ed] convictions that [the defendant had] been convicted of" without listing the periods of incarceration. Counsel argued that the State's June 21, 2006, post-verdict "Sentencing Position" only "partially compl[ied]" with the notice requirement and was untimely.

The trial court determined that the defendant had sufficient notice of his status as a repeat violent offender from the May 12, 2003 filing and denied his motion for new trial. An order denying the defendant's motion for new trial was filed on August 29, 2008. The defendant filed a timely notice of appeal on September 11, 2008.

Issues on Appeal

The defendant argues two issues on appeal. First, he argues that the convicting evidence was insufficient as a matter of law. Second, he argues that the trial court erred in finding him a repeat violent offender, citing the State's failure to prove a separate period of incarceration for his Oregon sodomy convictions. Although not argued on appeal, we will analyze, pursuant to our authority to review plain error, whether the post-verdict filing of the notice of the defendant's status as a repeat violent offender, and his sentencing as such, constitutes reversible error.

I. Sufficiency of the Evidence

The defendant argues that the jury was not presented with sufficient evidence to sustain his aggravated rape conviction. A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is

insufficient to support the verdict because a guilty verdict destroys the presumption of innocence and replaces it with a presumption of guilt. *See State v. Evans*, 108 S.W.3d 231, 237 (Tenn. 2003); *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). This court must reject a defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999).

The defendant summarizes his issue by arguing, "The victim's alleged recollections in this case are too suspect to be the basis of a verdict of guilt beyond a reasonable doubt." However, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. *See Carruthers*, 35 S.W.3d at 558; *Hall*, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. *See State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Issues of the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this court will not re-weigh or re-evaluate the evidence. *See Evans*, 108 S.W.3d at 236; *Bland*, 958 S.W.2d at 659. This court may not substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. *See Evans*, 108 S.W.3d at 236-37; *Carruthers*, 35 S.W.3d at 557.

The defendant was convicted of aggravated rape, which Tennessee Code Annotated section 39-13-502 defines as "unlawful sexual penetration of a victim by the defendant" accompanied by the defendant's causing bodily injury to the victim. *See* T.C.A. § 39-13-502(a)(2). The evidence presented by the State adequately supports the jury's verdict. The victim testified that the defendant choked her while attempting to have vaginal sex with her against her will. She stated that she told the defendant to stop and that he was hurting her. She testified that, after several unsuccessful attempts, the defendant obtained a lubricant to successfully complete the sexual act. The victim believed that the defendant would kill her if she did not cooperate. The jury, by convicting the defendant, clearly credited the victim's version of these events. Photographs and further testimony from Detective Boucher and Doctor Mesmer documented the injuries to the victim's face and neck, indicating the defendant's striking and choking the victim during the rape.

We are without authority to re-weigh the victim's testimony, as the defendant urges on appeal, *see Evans*, 108 S.W.3d at 236; *Bland*, 958 S.W.2d at 659, and we find the trial evidence legally sufficient to support the defendant's conviction of aggravated rape.

II. Sentencing as a Repeat Violent Offender

The defendant argues that "the [S]tate introduced no evidence that [the] defendant had actually served any period of incarceration pursuant to [his Oregon sodomy convictions]." He argues that, despite the requirement of Code section 40-35-120 that the State prove beyond reasonable doubt that the defendant's prior conviction included a separate period of confinement,

the State presented "no evidence that [the] defendant had actually served jail time, prison time, community corrections, split confinement, or periodic confinement as a result of that judgment."

Pursuant to Code section 40-35-120, commonly referred to as the "three strikes" law, offenders convicted of specified violent offenses who have a record of certain proven predicate convictions qualify for an automatic sentence of life without parole, rather than variable sentencing under the usual statutory scheme of offender ranges and offense classes. *See* T.C.A. § 40-35-120; *State v. Thompson*, 36 S.W.3d 102, 114 (Tenn. Crim. App. 2000). "[T]he [S]tate is required to file with the court and defense counsel a statement that the defendant is a repeat violent offender within 45 days of the arraignment." *Thompson*, 36 S.W.3d at 114 (citing T.C.A. § 40-35-120(i)(2)). The remedy for an untimely filing is a mandatory continuance of 45 days between the date of the untimely notice and the trial. *See* T.C.A. § 40-35-120(i)(2); *Thompson*, 36 S.W.3d at 114.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the trial court's determinations are correct. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Id.* "The burden of showing that the sentence is improper is upon the appellant." *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review reflects that the trial court properly considered all relevant factors and if its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The repeat violent offender statute, as relevant to this case, provides that a defendant convicted of aggravated rape, with a proven predicate conviction of child rape, qualifies as a repeat violent offender. *See* T.C.A. § 40-35-120(a)(3)-(4), -120(c)(1)(E)-(F). However, the statute specifically requires that a qualifying prior conviction "means a defendant serves and is released from a period of incarceration" for the predicate conviction prior to committing the immediate crime. *Id.* § 40-35-120(e)(1)(B). A "separate period of incarceration" includes,

> a sentence to a community correction program . . . , a sentence to split confinement . . . , or a sentence to periodic confinement . . . . Any offense designated as a violent offense pursuant [to the repeat violent offender statute] that is committed while incarcerated or committed while such prisoner is assigned to a program whereby the prisoner enjoys the privilege of supervised release into the community, including, but not limited to, work release, educational release, restitution release, medical furlough or that is committed while on escape status from any correctional institution shall be considered as a separate period of incarceration . . . .

Id. § 40-35-120(e)(2).

The record shows that the defendant was convicted of "deviate sexual intercourse with . . . a child" as reflected by an Oregon judgment of conviction filed September 14, 1995. The judgment provides that the defendant was "sentenced to the custody of the Corrections Division of the State of Oregon . . . for a period not to exceed 111 months . . . ." It further provides that the defendant was "remanded to the custody of the Klamath County Sheriff for transportation to the Corrections Division of the State of Oregon for service of this sentence." The trial court did not err in considering the certified Oregon judgment as proof of a previous period of incarceration. Further, because the defendant testified to being in Anderson County in 2003, the trial court was within its purview to consider his presence in Tennessee at the time of the offense in this case as evidence of his release from a separate period of incarceration. *See State v. Thomas D. Stanton*, No. M2003-03049-CCA-R3-CD, slip op. at 15-16 (Tenn. Crim. App., Nashville, Mar. 17, 2005) (finding uncontroverted certified judgments of qualifying convictions adequate proof of a defendant's repeat violent offender status).

III. Plain Error Analysis

Although not presented by the defendant on appeal, we must determine whether the State's post-verdict filing of notice of the defendant's status as a repeat violent offender constituted plain error as provided by Tennessee Rule of Appellate Procedure 36(b). *See* Tenn. R. App. P. 36(b). Although our courts have reviewed the effect of a late-filed notice of a defendant's status as a repeat violent offender, *see Thompson*, 36 S.W.3d at 114-16, we have not reviewed whether such a notice is effective when filed *after the jury's verdict of conviction*.

The repeat violent offender statute mandates that the State file a "statement with the court and the defense counsel . . . that the defendant is a repeat violent offender" within 45 days of the defendant's arraignment. T.C.A. § 40-35-120(i)(2). The statement must set forth the dates of the prior periods of incarceration, as well as the nature of the prior conviction offenses. *Id.* If the State fails to meet this notice requirement, the statute provides as a remedy that "the defendant *shall* be granted a continuance so that such defendant will have forty-five (45) days between receipt of notice and trial." *Id.* (emphasis added). Our courts have ruled that, when this procedure is not followed due to defective or untimely notice, "the focus [is] on whether the defendant has been prejudiced by the [S]tate's defective or delayed notice." *Thompson*, 36 S.W.3d at 115; *State v. Calvin Otis Tanksley*, No. M1998-00683-CCA-R3-CD, slip op. at 11 (Tenn. Crim. App., Nashville, Oct. 4, 2004).

First, we consider whether the May 12, 2003 "Notice of Intention to Use Prior Bad Acts for Impeachment and Enhancement of Sentence" constituted a substantially compliant "statement" pursuant to Code section 40-35-120(i)(2), as the trial court found. As previously stated, this "notice" contained only a bare list of convictions and conviction dates. The filing made no mention of the defendant's status as a repeat violent offender as required by statute. *See* T.C.A. § 40-35-120(i)(2) (requiring a statement "that the defendant is a repeat violent offender"). The notice

only lists, albeit incorrectly, the date of conviction,[1] and it does not provide a period of incarceration. *See id.* (requiring that the statement "shall set forth the dates of the prior periods of incarceration"). Further, the May 12, 2003 filing does not describe how the Oregon sodomy conviction qualifies as a statutorily listed qualifying offense. *See id.* (requiring the statement set forth "the nature of the prior conviction"). We disagree with the trial court's determination that this notice qualified under our repeat violent offender statute, and we next analyze the June 21, 2006 "Sentencing Position."

After the jury convicted the defendant, the State's prosecutor filed a "Sentencing Position" identifying the defendant as a repeat violent offender. The filing reads, in total,

> Comes the State and would show:
>
> 1) That the State prior to trial furnished notice on May 12, 2003 that it would use prior sodomy convictions in Oregon in 1995 for sentencing purposes.
>
> 2) That defendant's three convictions in 1995 for sodomy place defendant in the category of a "repeat violent offender" under TCA 40-35-120 since the crimes of sodomy of which defendant was convicted are Class A felonies and have the identical elements of the Tennessee crime called "Rape of a Child".
>
> Wherefore the State's position is that the Court pursuant to TCA 40-35-120(2) [sic] has no discretion and "shall" sentence defendant to life without possibility of parole upon a finding beyond a reasonable doubt that he is a repeat violent offender.

Although this filing fails to list periods of incarceration, it is the only filing by the State that we can construe as even marginally compliant with Code section 40-35-120(i)(2).

The repeat violent offender statute clearly mandates that the prosecutor's statement that the defendant possessed qualifying convictions to be sentenced as a repeat violent offender be filed *before* trial. T.C.A. § 40-35-120(i)(2). This is apparent through the statute's provided remedy, that the defendant *shall* be granted a 45-day continuance "between the receipt of notice and trial." *See id.* From our reading, the statute simply does not contemplate a post-trial, post-verdict filing of the State's notice of the defendant's repeat violent offender status. This is a different factual scenario than that presented in *Thompson*, where notice filed pretrial was simply untimely. Here, the Code section 40-35-120(i)(2) notice was not filed until after the jury's verdict, and, as a result, we will consider the post-verdict filing as though the State failed to provide any statutorily compliant notice whatsoever.

---

[1] The notice filed by the State's prosecutor lists the conviction date for the Oregon convictions as September 12, 1995. However, the judgment of conviction clearly reads September 13, 1995, and the stamp file reads September 14, 1995.

This court has not extensively analyzed the repeat violent offender statute; however, we note that its notice requirement is comparable to that listed in Code section 40-35-202(a), a recidivist sentencing statute requiring notice of a defendant's enhanced punishment range. Code section 40-35-202(a) requires the State to file notice of its intent to seek punishment of the defendant as a multiple, persistent, or career offender not less than ten days before trial or acceptance of a plea. T.C.A. § 40-35-202(a). Our supreme court has explained that the notice requirement is intended "to provide fair notice to an accused that he is exposed to other than standard sentencing"; "to order plea-bargaining"; "to inform decisions to enter a guilty plea"; "to aid to some extent trial strategy"; and to "evaluat[e] the risks and chart[] a course of action before trial." *State v. Adams*, 788 S.W.2d 557, 559 (Tenn. 1990). Pursuant to this reasoning, our courts have repeatedly held that prejudice is required for a defendant to receive appellate relief for the *pretrial* late-filing of Code section 40-35-202(a) notice. *See State v. Stephenson*, 752 S.W.2d 80, 81 (Tenn. 1988) ("[T]he fact the notice is not filed until the date trial begins does not render the notice ineffective in the absence of some showing of prejudice on the part of the accused . . . ."); *State v. Christopher Lamont Kelso*, No. E2000-01602-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Knoxville, June 18, 2001). Further, it is clear that a complete failure to file any notice is reversible error when it results in the trial court's sentencing the defendant to an enhanced offender status range. *See State v. Carter*, 121 S.W.3d 579, 585 (Tenn. 2003) ("[F]ailure to file any notice of sentencing status is grounds for re-sentencing.").

In the present case, the record shows that the trial court misunderstood the mandates of the repeat violent offender statute's notice provision. First, as mentioned above, we disagree with the trial court that the May 12, 2003 listing of convictions sufficed to meet the statutory requirements. Second, we note that the court continually asked defense counsel whether the defendant suffered prejudice as a result of the post-verdict notice, citing *Thompson*, and that the court indicated that the remedy for a late-filed statement was a 45-day continuance of the *sentencing hearing*. The mandatory continuance required by Code section 40-35-120(i)(2) clearly references a continuation of the trial date, not the sentencing hearing date. *See* T.C.A. § 40-35-120(i)(2).

We do not know why trial counsel failed to object to the post-verdict filing of this notice or why appellate counsel did not maintain his objection, which he made during the motion for new trial, in his appeal to this court. Because of this latter failure, we may not grant any relief unless the notice impropriety constitutes "plain error."

Before plain error pursuant to Rule 36(b) of the Tennessee Rules of Appellate Procedure may be so recognized, it "must be 'plain' and it must affect a 'substantial right' of the accused." *State v. Adkisson*, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994). The word "'plain' is synonymous with 'clear' or equivalently 'obvious.'" *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993). The plain error rule "leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id*. at 732, 113 S. Ct. at 1776 (citations omitted).

In *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000), our supreme court adopted the standard announced by this court in *Adkisson*. There, we defined "substantial right" as a right of "fundamental proportions in the indictment process, a right to the proof of every element of the offense, and is constitutional in nature." *Adkisson*, 899 S.W.2d at 639. Our supreme court also adopted *Adkisson*'s five factor test for determining whether an error should be recognized plain:

> "(a) the record must clearly establish what occurred in the trial court;
> (b) a clear and unequivocal rule of law must have been breached;
> (c) a substantial right of the accused must have been adversely affected;
> (d) the accused did not waive the issue for tactical reasons; and
> (e) consideration of the error is 'necessary to do substantial justice.'"

Smith, 24 S.W.3d at 282 (quoting *Adkisson*, 899 S.W.2d at 641-42). "[A]ll five factors must be established by the record before [a reviewing court] will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Id.* at 283. Our supreme court also observed that "the 'plain error must [have been] of such a great magnitude that it probably changed the outcome of the trial.'" *Id.* (quoting *Adkisson*, 899 S.W.2d at 642) (internal quotation marks omitted).

In review of these factors, we cannot say the issue at hand constitutes plain error. Although the post-verdict filing of the Code section 40-35-120(i)(2) statement clearly breached an unequivocal rule of law, we cannot glean from the record whether the violation of the statute adversely affected the defendant. *See, e.g.*, *Crump v. State*, 672 S.W.2d 226, 227 (Tenn. Crim. App. 1984) (holding that failure to file Code section 40-35-202(a) notice before guilty plea did not invalidate plea when record reflected that defendant knew of State's intent to pursue sentencing as a Range II offender). Because the otherwise-reversible error's effect, if any, on the defendant is not clear from the record before us, we cannot grant the defendant relief pursuant to our plain error analysis.

We note that, in a *Momon* hearing, *see Momon v. State*, 18 S.W.3d 152, 162 (Tenn. 1999) ("At any time before conclusion of the proof, defense counsel shall request a hearing, out of the presence of the jury, to inquire of the defendant whether the defendant has made a knowing, voluntary, and intelligent waiver of the right to testify."), the defendant testified that he was offered a plea agreement that would have resulted in a six-year sentence. We further note that, because no repeat violent offender notice was pending when the defendant entertained the plea offer, the defendant's rejection of a six-year sentence might bespeak prejudice caused by the failure to file a timely notice. Nevertheless, we cannot discern at this juncture whether the plea offer was entertained during the 45-day period prior to trial or, even if it was, whether the defendant would have accepted the plea offer in the face of a timely notice. Perhaps in a proper setting for an evidentiary hearing such as a post-conviction proceeding, the defendant might be able to establish the prejudice necessary to successfully challenge the conviction, *see Strickland v. Washington*, 466 U.S. 668, 693,

104 S. Ct. 2052 (1984), but at this point in the direct appeal, the record does not warrant a finding of plain error.

For the reasons explained, the judgment of the trial court is affirmed.

_____

JAMES CURWOOD WITT, JR., JUDGE